Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

MAURICE BROWN,

Petitioner,

v.

DONALD N. SNYDER, JR., in his official capacity as Director of the Illinois Department of Corrections; JOHN C. BATTLES, in his official capacity as Warden of the Illinois River Correctional Center; MICHAEL F. SHEAHAN, in his official capacity as Sheriff of Cook County, Illinois; and ERNESTO VELASCO, in his official capacity as Executive Director of the Cook County, Illinois Department of Corrections,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WILLIAM J. HARTE
Counsel of Record
COURTNEY C. NOTTAGE
111 West Washington Street
Suite 1100
Chicago, IL 60602
(312) 726-5015

Counsel for Petitioner

170169

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

43 pp

QUESTION PRESENTED

Whether the Seventh Circuit erred in not issuing a certificate of appealability.

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Petitioner, Maurice Brown (hereinafter "petitioner"), respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit, entered in this cause on August 28, 2001.

CITATIONS TO OPINIONS BELOW

The August 28, 2001 order of the Court of Appeals for the Seventh Circuit (hereinafter the "Seventh Circuit") is printed in full in the appendix at 1a to 2a.

The April 2, 2001 Memorandum Opinion of the United States District Court for the Northern District of Illinois, Eastern Division (hereinafter "District Court"), is printed in full in the appendix at 3a to 5a. The March 9, 2001 Memorandum Opinion of the District Court is printed in full in the appendix at 6a to 14a.

The October 6, 1999 order of the Supreme Court of Illinois is printed in full in the appendix at 16a. The April 19, 1999 Order of the Appellate Court of Illinois is printed in full in the appendix at 17a to 25a.

STATEMENT OF JURISDICTION

Petitioner seeks review of the order of the Seventh Circuit entered on August 28, 2001, denying petitioner's request for the issuance of a certificate of appealability.

Jurisdiction is conferred upon this Court to review the August 28, 2001 order of the Seventh Circuit by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 2253 provides:

Appeal.

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

Petitioner's conviction arose out of the beating of a fellow inmate by other inmates while they were awaiting trial in Tier 2 of the Cook County Jail ("Tier"). (Petitioner's Memorandum of Law in Support of Petitioner Maurice Brown's Petition for Habeas Corpus ("Pet. Memo."), Ex. D, pp. A9-11, A15-19). On the day of the beating, there were 40 to 60 inmates on the Tier. (Pet. Memo., Ex. D, p. A138). The beating victim, Necomoshea Moore ("Moore"), was beaten into a coma with soap-filled socks. (Pet. Memo., Ex. D, pp. A116-118).

Thirteen months after the beating incident, Moore was initially shown by the prosecutor seven inmate photographs that depicted petitioner and the six co-defendants with their names and inmate numbers listed under their faces. (Pet. Memo., Ex. D, pp. A138-146, A154-160, A162-163, A167-169).

After the initial showing of the seven photographs, Moore was shown about ten photographs from which he selected the seven defendants. (Pet. Memo., Ex. D, p. A165). Then he was shown 15 photographs that included the ten. (Pet. Memo., Ex. D, pp. A165-166).

Moore acknowledged that initially he could not remember how he was beaten up. (Pet. Memo., Ex. D,

pp. A136-137). However, Moore's memory was jogged after he was initially shown the seven photographs. (Pet. Memo., Ex. D, pp. A163-164, A166-167).

At trial, petitioner moved to suppress the photographic identification as unconstitutionally suggestive. (Pet. Memo., Ex. D, pp. A161-162). The trial court ultimately denied the motion (Pet. Memo., Ex. E, p. C12), and petitioner was convicted of attempted murder and aggravated battery. Seven months after petitioner's conviction at trial, Moore was quoted as saying that he could not remember events that had taken place in his life one hour prior. (Pet. Memo., Ex. F, p. F2).

Petitioner appealed the trial court's determination to the Illinois Appellate Court. The Illinois Appellate Court affirmed the attempted murder conviction, reversed the aggravated battery conviction and upheld the trial court's ruling regarding the photographic identification. (App. 17a-25a).

Petitioner unsuccessfully sought leave to appeal to the Illinois Supreme Court. (App. 16a). Petitioner filed his habeas corpus petition with the United States District Court for the Northern District of Illinois where he raised the same issues as he did in the state courts. The District Court denied the petition, noting that petitioner had not met his burden and shown that the photo array was impermissibly suggestive (App. 11a), nor did he meet his burden of showing that his conviction was not supported by the evidence. (App. 13a, 14a).

Petitioner appealed the District Court's decision, but the District Court denied petitioner a certificate of appealability. The District Court found that there had been no substantial

showing of the denial of a constitutional right. (App. 4a). Thereafter, petitioner filed a request to issue a certificate of appealability with the Seventh Circuit Court of Appeals ("Seventh Circuit"), once again raising the same issues. The Seventh Circuit determined that there was no substantial showing of the denial of a constitutional right. (App. 2a).

REASONS FOR GRANTING THE WRIT

This case is compelling because underneath these facts, the core of our criminal justice system, i.e., any person ever suspected of having committed a crime will meet a system that affords him or her fairness and certain rights, has been trampled upon; a trampling that without rectification will send the wrong message at a minimum to those men and women prosecutors who prosecute in Cook County, Illinois, and to law enforcement officials throughout the country.

In this case, the prosecutor initially showed the victim, who was beaten into a coma while awaiting trial in the Cook County jail, seven photographs for identification purposes of the seven persons that the prosecutor ultimately prosecuted. The photographs, one of which depicted petitioner, were inmate photographs with names and inmate numbers listed under their faces. The victim, admittedly having little, if any, memory of the event, was shown the photographs 13 months after the event.

Under *Simmons v. United States*, 390 U.S. 377 (1968), the photographic array was impermissibly suggestive violating petitioner's Fourteenth Amendment right to due process of law. Moreover, the victim's identification of petitioner was not reliable as required under *Manson v.*

Brathwaite, 432 U.S. 98, 114 (1977), in light of the unconstitutional array and the fact that the victim had no real memory of the event.

Finally, it was determined that the purported eyewitness, after having been exposed with significant credibility problems, was not in the place in which he said he was when he allegedly witnessed the incident, leaving no reliability in terms of his identification of petitioner. It is from these sources of evidence that the State was found to have met its burden of proving all the elements of the crime beyond a reasonable doubt.

The Seventh Circuit's decision not to issue a certificate of appealability conflicts with this Court's decision in *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983), as petitioner made a substantial showing that he was denied due process. Due process, a tenet of not only American jurisprudence but of our society, shines as if it were a beacon. And this case tests the brightness of due process in our criminal justice system.

I. THE SEVENTH CIRCUIT ERRED IN NOT ISSUING A CERTIFICATE OF APPEALABILITY.

The Seventh Circuit erred in not issuing a certificate of appealability because under the standards set out by this Court in *Barefoot v. Estelle*, 463 U.S. 880, 893, n.4 (1983), petitioner made a substantial showing that he was denied due process. Under *Barefoot*, for a petitioner to make such a showing, "he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate

to deserve encouragement to proceed further.'" *Id.* The issues asserted by petitioner here could be resolved by a court in a different manner.

A. The Photographic Array Was Suggestive.

The District Court, in denying the issuance of a certificate of appealability, indicated that it had "found that the array was not suggestive, and even if it were to be found suggestive, there existed sufficient evidence that the identification was otherwise reliable." (App. 4a).

Three courts have affirmed the notion that the showing of a suspect's photograph and only their photograph for identification purposes is unconstitutionally suggestive. (*United States v. Palmieri*, 623 F. Supp. 405 (S.D. N.Y. 1985); *People v. Bonilla*, 163 Misc.2d 822, 622 N.Y.S.2d 429 (Sup. 1994); and *People v. Laurenson*, 131 Ill.App.2d 2, 268 N.E.2d 183 (1st Dist. 1971)). What is so telling from *Palmieri*, *Bonilla* and *Laurenson* is that a court could resolve this case differently because no court in this case thus far has explicitly addressed the fact that Moore had or has no real memory of the incident or his attackers, and that his memory purportedly emerged when he was initially shown the seven photographs of the seven defendants who were prosecuted. And certainly, if Moore, at the time of trial, could not remember the names of his cellmates (Pet. Memo., Ex. D, p. A144), and months after the trial could not remember things that occurred an hour prior (Pet. Memo., Ex. F, p. F2), he certainly could not have remembered with any reliability his attackers.

Reliability is key here, as pronounced in *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977). There is simply no

reliability in the testimony of Moore relating to the incident and who may have been involved in the beating of Moore. *Simmons v. United States*, 390 U.S. 377, 383-384 (1968), makes clear that an initial suggestive showing irreversibly contaminates the identification process. Once Moore was initially shown the seven photographs of the seven defendants with their names and inmate numbers under their faces, everything that happened thereafter regarding the identification process was contaminated. Thus, the two subsequent arrays of ten and 15 photographs, both of which included the seven defendants, shown to Moore did not rehabilitate the initial unconstitutional showing.

The same can be said for the identification made in-court. Moore was shown the seven photographs of the seven defendants the day of trial. (Pet. Memo., Ex. D, pp. A156, A162-163). But for the initial suggestive showing and the showing the day of trial, Moore could not have made the in-court identification. *See United States v. Duprey*, 895 F.2d 303, 308 (7th Cir. 1989); *Simmons v. United States*, 390 U.S. 377, 384 (1968). Otherwise, the State would not have had to show the seven photographs to Moore the day of trial. Reliability on the part of Moore is simply not present here.

B. There Was No Proof Beyond A Reasonable Doubt.

Though petitioner contended that his conviction was not supported by the evidence in violation of his right to due process, the District Court found that petitioner did not make such a showing. (App. 4a). If a state court conviction is not supported by sufficient evidence, that conviction violates due process and entitles a convicted defendant to habeas relief. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). "Habeas

corpus relief is justified if no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Balfour v. Haws*, 892 F.2d 556, 566 (7th Cir. 1989).

The identification of petitioner by the alleged eye-witness, Joseph Ippolito ("Ippolito"), was not reliable. Notwithstanding that Ippolito admitted to lying about what he did or did not see (Pet. Memo., Ex. D, pp. A84-86), and the fact that he was apparently given a deal by the State after he gave his testimony (Pet. Memo., Ex. D, pp. A86-87), it was determined that Ippolito was not where he said he was when he purportedly heard and saw what he testified to. Ippolito allegedly heard the planning of the beating of Moore by persons in the cell next to his and witnessed the incident from the chuckhole in the door of his cell, lower three. (Pet. Memo., Ex. D, pp. A26, A77-78, A93). However, the record shows that Ippolito's cell was not lower three, but lower one. (Pet. Memo., Ex. E, pp. C3-4). Thus, all of Ippolito's testimony as to what he heard others said about beating Moore and what he saw while in the lower three cell can be taken with a grain of salt, as the record is devoid of any testimony as to what kind of vantage point, if any, Ippolito would have had from his stated cell in relation to the incident.

Nor did the State present any physical evidence linking petitioner to the beating of Moore like it did with three other defendants. In all, the State failed to prove petitioner's guilt beyond a reasonable doubt.

C. There Was No Proof Of Specific Intent To Kill.

To petitioner's claim that the trial court did not possess sufficient evidence to find specific intent to kill, the District Court indicated in its denial to issue the certificate of

appealability it had found that the petitioner "could not meet his heavy burden to show that there was error in the state trial court." (App. 4a). This determination rests in the District Court's opinion that sufficient evidence existed in the testimony of Ippolito who testified that "[p]etitioner was present when the plan to attack Moore was formulated." (App. 14a).

In order to convict someone of attempted murder, it is indispensable that the State prove that the defendant had the specific intent to kill at the time the act was committed. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Nelson v. Thieret*, 793 F.2d 146, 148 (7th Cir. 1986); and *People v. Hill*, 276 Ill. App.3d 683, 658 N.E.2d 1294 (1st Dist. 1995).

It was error for the District Court to rely on Ippolito's testimony once again for the reasons stated above in Point IB.

CONCLUSION

From the foregoing, it is clear that petitioner has made a substantial showing that he was denied a federal right. All the issues raised by petitioner are debatable among jurists and are worthy of proceeding further for appellate review. And it is certainly not unfathomable that a court could resolve each of the issues raised by petitioner in a different manner. For all of these and the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM J. HARTE
Counsel of Record
COURTNEY C. NOTTAGE
111 West Washington Street
Suite 1100
Chicago, IL 60602
(312) 726-5015

Counsel for Petitioner

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING REQUEST FOR CERTIFICATE OF APPEALABILITY DATED AND DECIDED AUGUST 28, 2001

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Submitted August 14, 2001
Decided August 28, 2001

Before
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

No. 01-1814

MAURICE BROWN,

Petitioner-Appellant,

v.

DONALD N. SNYDER, ET AL.,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division

No. 00 C 6062

Charles P. Kocoras, *Judge.*

Appendix A

ORDER

Maurice Brown has filed an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED APRIL 2, 2001

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

00 C 6062

MAURICE E. BROWN,

Petitioner,

vs.

DONALD N. SNYDER, JR., in his official capacity as Director of the Illinois Department of Corrections, JOHN C. BATTLES, in his official capacity as Warden of the Illinois River Correctional Center, MICHAEL F. SHEAHAN, in his official capacity as Sheriff of Cook County, Illinois Department of Corrections,

Respondents.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on Maurice Brown's motion for a certificate of appealability pursuant to 28 U.S.C. § 2253(c). For the reasons set forth below, the motion is denied.

Appendix B

DISCUSSION

Maurice Brown moves the Court to issue a certificate of appealability from the Court's denial of his petition for a writ of habeas corpus. Pursuant to 28 U.S.C. § 2253(c)(1), no appeal may be taken from the final order in a habeas proceeding in which the detention complained of arises out of process issued by a State court unless a circuit justice or judge issues a certificate of appealability. A certificate of appealability under this section may issue only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). *See also Heidelberg v. Illinois Prisoner Review Board*, 163 F.3d 1025 (7th Cir. 1998).

Brown has not made a substantial showing in this case. In his habeas petition, Brown first challenged the photographic array used by the victim to identify him as impermissibly suggestive in violation of his right to due process. The Court found that the array was not suggestive, and if even if it were to be found suggestive, there existed sufficient evidence that the identification was otherwise reliable. Second, Brown also contended that his conviction for murder in Illinois state court was without sufficient evidence in violation of his right to due process. The Court found that Brown could not show that his rights were violated. Third, Brown claimed that the Illinois state court did not possess sufficient evidence to find specific intent to kill. Likewise, the Court found that Brown could not meet his heavy burden to show that there was error in the state trial court.

Appendix B

Since this Court's ruling, Brown has not addressed the reasons for this Court's dismissal of his habeas petition. *See Borzych v. Bertrand*, 981 F.Supp. 1167, 1169 (E.D. Wis. 1997). Further, this Court has identified no issue that is "debatable among jurists of reason." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 103 S.Ct. 3383, 77 L. Ed. 2d. 1090 (1983) (citations omitted). The Court finds that there has been no substantial showing of the denial of a constitutional right.

CONCLUSION

Brown's motion for a certificate of appealability is denied.

s/ Charles P. Kocoras
Charles P. Kocoras
United States District Judge

Dated: April 2, 2001

APPENDIX C — MEMORANDUM OPINION AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MARCH 9, 2001

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

00 C 6062

MAURICE E. BROWN,

Petitioner,

vs.

DONALD N. SNYDER, JR., in his official capacity as Director of the Illinois Department of Corrections; JOHN C. BATTLES, in his official capacity as Warden of the Illinois River Correctional Center; MICHAEL F. SHEAHAN, in his official capacity as Sheriff of Cook County, Illinois; and ERNESTO VELASCO, in his official capacity as Executive Director of the Cook County, Illinois Department of Corrections,

Respondents.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

Maurice Brown was convicted of attempted first degree murder and aggravated battery on November 20, 1996, after a bench trial, and sentenced to thirteen years in prison. Brown

appealed to the Illinois state appellate court, and then to the Illinois Supreme Court, who denied him leave to appeal. Brown now files this petition for a writ of habeas corpus under 28 U.S.C. § 2254. For the reasons set forth below, the Court declines to issue the writ.

BACKGROUND

Maurice Brown was tried along with six co-defendants in the Circuit Court of Cook County, Illinois for the May 22, 1995 beating of Necomoshea Moore. All of the defendants and the victim were inmates at the Cook County Jail at the time of the incident. As a result of this beating, Moore was in a coma for eight weeks and was in the hospital until January of 1996.

The seven accused received a bench trial in front of Judge Henry Simmons in the fall of 1996. At trial, the state presented the testimony of Joseph Ippolito, another inmate at Cook County Jail at the time of the beating. Ippolito testified that on the day of the beating, he was in a cell with eight or nine other inmates, including the Petitioner, Maurice Brown. Someone came into the cell approximately fifteen minutes before the beating and said "Nick (identified as the victim, Necomoshea Moore) had tricked on one of his regents" and that he had to be "dealt with and radicated." Ippolito testified that this statement meant Moore had wronged a gang member, and was to be beaten in retaliation. Minutes later, from another cell in the Cook County Jail, Ippolito testified that he overheard a conversation between these same individuals. They discussed a plan to lure Moore into the cell. Ippolito testified that he saw the Petitioner

approach Moore and ask to talk to him. Moore then followed Petitioner into a cell, followed quickly by four other individuals with t-shirts pulled over their faces. Ippolito testified that he heard loud noises coming from the cell that sounded like someone hitting the walls or a person. Ippolito also testified that he heard Moore cry out that he "can't handle it."

The state also presented the testimony of Necomoshea Moore, the victim. Moore testified that he was approached by the Petitioner, who he identified as "Maurice," and followed him into the cell. Once he was in the cell, Moore testified that he was attacked by several men who hit him with socks filled with bars of soap. Moore spent eight weeks in a coma and was hospitalized for several months. Moore testified that while in the hospital, several months after the attack, he was shown photos of the seven defendants. Trial counsel for the petitioner moved to suppress Moore's identification of the defendants, claiming that the photographic array presented to Moore was impermissibly suggestive. The motion to suppress was denied.

The state also presented the testimony of four Cook County corrections officers. These guards testified to finding the beaten body of the victim, as well as a pair of bloody pants in the garbage, an inmate without pants, and other inmates with blood on their pants. Petitioner Brown was not named in any of this testimony.

The defense presented no witnesses after its motion to suppress was denied.

Appendix C

Judge Simmons found the Petitioner guilty of first degree attempted murder and aggravated battery on November 20, 1996. The Petitioner was sentenced to 13 years in the Illinois Department of Corrections. On appeal, the Illinois Appellate Court, First District, vacated the conviction for aggravated battery, since the prosecution had proved only one physical act. The Petitioner's application for leave to appeal to the Illinois Supreme Court was denied by mandate issued October 28, 1999. On October 3, 2000, the Petitioner filed this petition for a writ of habeas corpus.

LEGAL STANDARD

A federal court may issue a writ of habeas corpus where the state court adjudication of a petitioner's claim resulted in a decision "contrary to, or resulted in an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Supreme Court has stated that the "contrary to" and the "unreasonable application" clauses of § 2254(d)(1) have independent meaning. *See Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In order for a court to grant the writ under the "contrary to" clause, a state court's decision must be "substantially different from relevant [Supreme Court] precedent." *Id.* at 405. This category is limited to the "narrow range of cases where the state court applied a rule that contradicts the governing law as expounded by the Supreme Court or where the state court confronts facts materially indistinguishable from a Supreme Court case and nevertheless arrives at a different result." *Washington v. Smith*, 219 F.3d 620, 628 (7th Cir. 2000). A court will find a decision to be an "unreasonable application"

of Supreme Court precedent when "the state court identifies the correct governing legal principle but unreasonably applies that principle to facts of the prisoner's case." *Williams*, 529 U.S. at 413. The Supreme Court has noted that "an *unreasonable* application of federal law is different than an *incorrect* application of federal law. *Id.* at 410. The test for unreasonableness is an objective one. *Id.*; *Morgan v. Krenke*, 232 F.3d 562, 565 (7th Cir. 2000).

DISCUSSION

The Petitioner presents three arguments to this Court. He argues that: (1) the photographic array shown the victim was limited to the seven co-defendants and therefore impermissibly suggestive; (2) the state court did not have sufficient evidence to find Petitioner guilty beyond a reasonable doubt; and that (3) the state court did not have sufficient evidence to find that Petitioner acted with specific intent. This Court will address each argument in turn.

1. Impermissibly suggestive photographic array

The Petitioner first challenges the photographic array presented to the victim as impermissibly suggestive. While the victim was in the hospital, prosecutors visited him with pictures of the seven co-defendants. The state appellate court found that Moore was presented with two different photographic arrays. One array consisted of all 20-40 prisoners in the cell block. Record at A-141 (attached as Ex. D to Pet.'s Mem. of Law). The other array had between 7 and 15 pictures, and included all of the indicted defendants in this case. Record at A-164-66; *see also* Appellate Ct. Op.

at 6 (attached as Ex. B to Pet.'s Mem. of Law). Petitioner now contends, as he did in state court, that the array was impermissibly suggestive, and the identification testimony of the victim should have been suppressed.

There are two steps to determining whether an identification procedure violated a defendant's rights. First, the procedure employed must be examined to see if it was unduly suggestive. *United States v. Alanis*, 109 F.3d 1239, 1242 (7th Cir. 1997). The defendant has the initial burden of proving that the procedure was unduly suggestive. *United States v. L'Allier*, 838 F.2d 234, 239 (7th Cir. 1988). If it is found to be suggestive, the totality of the circumstances is reviewed to see if the identification was nonetheless reliable. *Alanis*, 109 F.3d at 1242.

In order for the Petitioner to show that the photographic array was impermissibly suggestive, the defendant must show "a substantial likelihood that [the witness's] identification was based on an irreparable misidentification." *L'Allier*, 838 F.2d at 239. In the record before the Court, there are two competing stories. There appear to be two arrays shown the victim, one with all 40-60 inmates pictures (Record at A141) and one with between 7 and 15 pictures (Record at A-159-60; A-164-66). The photographs are not included in the record for this court (or the state appellate court) to undertake an independent review. Appellate Ct. Op. at 6; *see also Kubat v. Thieret*, 867 F.2d 351, 357 (7th Cir. 1989) (holding that photographic lineup was proper "especially upon independent viewing of the challenged arrays"). The Petitioner has not met his burden and shown that the array was impermissibly suggestive.

Appendix C

Even if the Court were to find the array impermissibly suggestive, the Supreme Court has stated that "admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses certain aspects of reliability." *Manson v. Brathwaite*, 432 U.S. 98, 106, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). To that end, the Supreme Court has found five factors to be helpful in determining reliability. *See Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). These factors are (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention at the time of crime; (3) the accuracy of the witness's pre-identification description of the criminal; (4) the level of certainty demonstrated by the witness at the time of the identification; and (5) the length of time between the crime and the identification. *Cossel v. Miller*, 229 F.3d 649, 655 *citing*, *inter alia*, *Manson*, 432 U.S. at 114; *Biggers*, 409 U.S. at 199-200.

The Court finds that there are sufficient indicia of reliability to support the admission of this identification. The Court takes particular note of the fact that the witness (Necomoshea Moore) had opportunity to view the defendant on a daily basis, since they were housed together in the Cook County Jail. The witness further had the opportunity to view the defendant immediately prior to the crime, when Brown approached Moore and asked Moore to follow him into the cell. The trial court had ample evidence to find that Moore was paying attention at the time of the crime, especially since he was the victim.

Appendix C

2. Insufficient evidence to find Petitioner guilty

A state court conviction that is not supported by sufficient evidence violates due process and merits habeas relief. *Virginia v. Jackson*, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). This relief "is justified if no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Balfour v. Haws*, 892 F.2d 556, 566 (7th Cir. 1989).

The Petitioner claims that the witnesses linking him with the beating, Joseph Ippolito and the victim Necomoshea Moore, were both of suspect credibility. The "insufficient evidence" standard is a very heavy burden for a defendant to carry. "The burden becomes even heavier . . . where there is a claim of insufficient evidence because of the unreliability of one or more witnesses. Matters of witness credibility, absent 'extraordinary circumstances,' are solely for the jury to evaluate." *United States v. Muskovsky*, 863 F.2d 1319, 1322 (7th Cir. 1988). The Court finds that the Petitioner cannot make such a showing in this case. Moore's identification of the Petitioner as the man who lured him into the cell has already been found to be reliable. The credibility of the other witnesses, including Ippolito, was taken into consideration by the trial judge. Brown's habeas petition has not established any "extraordinary circumstances" to disturb the judge's findings. *See United States ex rel. Coates v. McVicar*, 2001 WL 58981 (N.D. Ill. Jan. 19, 2001).

3. Insufficient evidence to find specific intent

As stated above, the Petitioner must carry a heavy burden to establish that the trier of fact acted without sufficient

evidence. "In evaluating [Petitioner's] argument, we are bound to affirm the verdict if the evidence, when viewed in the light more favorable to the government, establishes that any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." *United States v. Leibowitz*, 857 F.2d 373, 380 (7th Cir. 1988) (citations omitted).

The Petitioner claims that evidence of specific intent to kill is absent from the state's case. The Court finds that the Petitioner has not met his burden here. The trial court could have found that Petitioner intended to kill Moore from a number of pieces of evidence, including but not limited to, the testimony of Ippolito, who stated that the Petitioner was present when the plan to attack Moore was formulated.

CONCLUSION

For the preceding reasons, Maurice Brown's Petition for Writ of Habeas Corpus is denied.

s/ Charles P. Kocoras
Charles P. Kocoras
United States District Judge

Dated: March 9, 2001

Appendix C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 00 C 6062

Maurice E. Brown

v.

Donald N. Snyder, Jr., et al

JUDGMENT IN A CIVIL CASE

* * *

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Maurice Brown's petition for writ of habeas corpus is denied. Petitioner to take nothing. All matters in controversy having been resolved, final judgment is entered in favor of all Respondents and against Petitioner.

Michael W. Dobbins, Clerk of Court

s/ Stephen C. Tokoph
Stephen C. Tokoph, Deputy Clerk

Date: 3/9/2001

APPENDIX D — LETTER OF THE SUPREME COURT OF ILLINOIS DENYING PETITION FOR LEAVE TO APPEAL DATED OCTOBER 6, 1999

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

October 6, 1999

Mr. Courtney C. Nottage
William J. Harte, Ltd.
111 W. Washington St., Suite 1100
Chicago, IL 60602

No. 87576 – People State of Illinois, respondent, v. Maurice Brown, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1999.

APPENDIX E — ORDER OF THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT DATED APRIL 19, 1999

FIRST DIVISION
April 19, 1999

No. 1-97-0253

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

MAURICE BROWN,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County.

No. 95 CR 16834

Honorable Henry R. Simmons,
Judge Presiding.

ORDER

Following a bench trial, defendant was found guilty of attempted first degree murder and aggravated battery.

The court sentenced him to 13 years in prison for attempted first degree murder. Defendant presents the following issues for review: (1) whether the trial court erred in finding him guilty because the identification procedure was impermissibly suggestive; (2) whether the court erred in finding him guilty beyond a reasonable doubt due to an impermissibly suggestive identification procedure and other unreliable testimony concerning his involvement; (3) whether the State proved beyond a reasonable doubt that he had the specific intent to kill prior to the beating; and (4) whether the aggravated battery conviction must be reversed because the State presented evidence of only one act by defendant which cannot be the predicate for conviction on both counts.

The charges against defendant arose from beating of the victim, Necomoshea Moore, by a group of inmates in the Cook County Department of Corrections. Six other men were also charged with attempted first degree murder, and aggravated battery. Five codefendants were tried along with defendant, but none is involved in this appeal.

Joseph Ippolito testified that on May 22, 1995, he and the victim were inmates in the Cook County jail. He was awaiting trial on forgery charges, and had prior convictions for possession of stolen motor vehicle, auto theft, and unlawful use of a weapon by a felon. About 2:45 p.m., someone came into the cell and stated that the victim had "tricked" on one of his "regents" and had to be "dealt with and radicated." Ippolito was told to leave. Ippolito went to another cell where he was able to hear a conversation through the ventilation shaft. He saw Slim, whom he identified as defendant, approach the victim and ask to talk to him.

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The victim followed defendant into another cell and in turn was followed by four other individuals who had T-shirts over their faces. Defendant's face was not covered. The victim was beaten during or 15 minutes after the jail guards conducted a count of the inmates. He could hear loud banging from the cell like someone was crashing against the walls, and heard the victim yell to stop. Initially, Ippolito told an investigator, that he did not see or hear anything, but two days later he made a statement indicating that the beating took place one-half hour after the inmate count.

The victim testified that he was incarcerated awaiting trial on an attempted murder charge. At 3 p.m. on May 22, 1995, defendant asked to talk to him. The victim agreed and followed defendant to another cell. There was nothing covering defendant's face at this or any other time. When he got to the cell, Moore was attacked by a least four men who swung at him with socks filled with soap bars. He screamed for help before losing consciousness and was in a coma for eight weeks. Representatives from the State's Attorney office told him they had found inmates with blood on them and bloody clothing and showed him pictures, but they did not tell him they thought these inmates were involved. He once picked out seven defendants from a group of 10 or 15 photographs and then from a lot of 40 to 60 photographs and once just looked at 7 photographs which helped him to jog his memory. At this point, defendant orally moved to suppress the identification of the seven codefendants, claiming that the photographic array was unduly suggestive. The trial court denied the motion at the close of the evidence and also stated that it did not consider the out-of-court identification in making the finding.

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Officer Al Shelton, a jail guard, testified that at 3:30 p.m. codefendant McMillen told him the victim was lying on the floor in their cell. Officer Shelton found the injured victim, called paramedics and subsequently discovered three codefendants with blood on their clothing and one without pants. Officer Robert Lucas found a pair of bloody pants in the garbage. One codefendant was without pants and two other codefendants had blood on their pants.

Defendant first argues that the photographic pretrial identification procedure was impermissible suggestive because the victim did not have a clear memory of the incident before being shown the photographs. He argues that but for the seven-picture array, the victim would not have been able to make any identification at trial and that due process was violated when the pretrial identification was so impermissible suggestive that it produced a very substantial likelihood of irreparable misidentification. *People v. Smith*, 274 Ill. App. 3d 84, 89 (1995). The State responds that due process involves a two-part test involving first, the suggestiveness of the identification, and second, in the wake of a suggestive out-of-court identification, the reliability of the out-of-court identification and later in-court identification. *People v. Holcomb*, 192 Ill. App. 3d 158, 172 (1989).

A defendant moving to suppress an in-court identification as the product of a pretrial identification has the burden of establishing that the pretrial identification procedure was unnecessarily suggestive, and if he does so, the State must be able to show by clear and convincing evidence that an independent basis of reliability exists or the evidence will

be suppressed. *People v. Morissette*, 150 Ill. App. 3d 431, 436-37 (1986). The standard of review is whether the trial court's decision denying the motion to suppress the identification evidence was manifestly erroneous. *People v. Smith*, 274 Ill. App. 3d 84, 89 (1995). In evaluating out-of-court and in-court identifications, a trial court must consider the totality of circumstances guided by the following factors: the opportunity of the witness to view the criminal act, the witness' degree of attention, the accuracy of the prior description of the defendant, the level of certainty demonstrated by the witness at the confrontation and the time between the crime and the confrontation. *People v. Holcomb*, 192 Ill. App. 3d at 173-74. Reliability is the linchpin in determining the admission of identification testimony. *People v. Morissette*, 150 Ill. App. 3d at 438. Even if a pretrial identification procedure is unnecessarily suggestive, the constitutional standard for testing the reliability of an in-court identification is whether the out-of-court identification was so impermissible suggestive as to give rise to a substantial likelihood of irreparable misidentification, and the standard for testing the reliability of the out-of-court identification is similar except that the misidentification need not be "irreparable." *People v. Holcomb*, 192 Ill. App. 3d at 173.

The record here indicates that Moore was presented with groups of photographs on at least two occasions, once when he was presented a group of 7, or 10 or 15 photographs, apparently depicting all the indicted defendants in this case, and at another time when he was shown a larger group of 40 to 60 pictures. None of the photographs has been made part of the record on appeal. *Cf. People v. Brown*, 172 Ill. 2d 1,

41 (1996) (court was unable to say that the trial judge abused his discretion by admitting photographs which were not included in the record). In assessing identification testimony, we will not substitute our judgment for that of the trier of fact on questions involving witness credibility. *People v. Negron*, 297 Ill. App. 3d 519, 530 (1988).

Immediately prior to the crime, Moore had an opportunity to view defendant, who was not wearing a hood or mask. Moreover, Moore knew defendant prior to the beating, living with him in very close quarters in the Cook County jail. Also, the victim testified that he could identify his attackers by the voices. The trial court could have found from the evidence presented that Moore had a good opportunity to view defendant at the time of the crime, that he was paying close attention and that the identification was positive. Here, the trial court denied the defendant's motion to suppress, but also stated in making its finding it did not consider the out-of-court identification. Under the circumstances, we conclude that defendant did not meet his burden of establishing that the pretrial identification procedure was unnecessarily suggestive. The evidence shows that the in-court identification was the product, not of the photographic procedures, but of the witness' confrontation with defendant at the time of the crime. We conclude that the trial court's decision denying the motion to suppress was not manifestly erroneous.

Defendant also argues he was not proved guilty beyond a reasonable doubt because the identification testimony of the victim and Ippolito was not credible. A criminal conviction will not be set aside on review unless the evidence

is so improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). When a criminal conviction is challenged based on insufficient evidence, the relevant inquiry for the reviewing court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Campbell*, 146 Ill. 2d 363, 374 (1992). It is not the function of a reviewing court to retry a defendant, but it is the function of the trier of fact to assess the credibility of the witnesses, the weight to be given to their testimony and the inferences to be drawn from the evidence. *People v. Manning*, 182 Ill. 2d 193, 210 (1998). Defendant contends the eyewitness testimony was not reliable because there was a discrepancy in exactly when — before, during or after the inmate count — the attack began and because of Ippolito's prior convictions. Defendant points out that Ippolito lied when he first told an investigator he did not see or hear the attack. Defendant notes that after Ippolito gave a written statement, his forgery case terminated, and he was placed on probation. He also was a member of a gang. These arguments raised matters of credibility which the trial judge resolved against defendant. Although defendant points out there is no evidence that blood was found on his clothes or on his person, we believe the evidence clearly showed that defendant played a major role in initiating the beating, and we find no reasonable doubt concerning defendant's guilt.

Next, defendant contends the State failed to prove he had the specific intent to kill prior to the beating. *People v. Hill*, 276 Ill. App. 3d 683 (1995). He argues his intent was to beat, not kill, and that the victim was beaten with soap-filled

socks. Defendant says the only evidence presented by the State was that he walked with the victim to the victim's cell, which he says hardly rose to the level of evidence necessary to warrant finding specific intent to kill. He says there is no evidence that he actually participated in the beating of the victim, and a rational trier of fact could not find he had the specific intent to kill.

The State points out that intent to kill may be inferred from the character of the defendant's acts, the circumstances surrounding the commission of the offense, including the character of the assault, the nature and seriousness of the injury and use of a deadly weapon, or by evidence that defendant voluntarily and willfully committed an act whose natural tendency was to destroy another's life. *In re T.G.*, 285 Ill. App. 3d 838, 843 (1988). "A finding of the intent to kill is a question of fact that will not be reversed unless there is a reasonable doubt as to the defendant's guilt." *In re T.G.*, 285 Ill. App. 3d at 843. A reasonable trier of fact could find from the evidence here that defendant was part of a group of men who attacked the victim, using soap-filled socks to beat the victim into a coma. A rational trier of fact could have found the specific intent to kill beyond a reasonable doubt.

Finally, defendant contends he cannot be convicted and sentenced for more than one offense arising out of the same physical act and the aggravated battery finding should be vacated. *People v. Lilly*, 56 Ill. 2d 493 (1974).

The prosecution produced evidence of one physical act. A defendant cannot be convicted for more than one offense arising out of the same physical act. *People v. Mack*, 105 Ill. 2d 103, 137 (1984).

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For the foregoing reasons, the conviction of defendant for aggravated battery is vacated and the conviction and sentence for attempt murder is affirmed.

Affirmed in part and vacated in part.

O'MARA FROSSARD, J., with O'BRIEN, P.J., and GALLAGHER, J., concurring.